LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
DEC 13 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term—1956

No. 280

P. S. GUSS, doing business as PHOTO SOUND PRODUCTS MANUFACTURING COMPANY,
Appellant

v.

UTAH LABOR RELATIONS BOARD
Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR THE NEW YORK STATE LABOR RELATIONS BOARD AS *AMICUS CURIAE*

PHILIP FELDBLUM
General Counsel
New York State Labor Relations Board
270 Broadway
New York 7, New York

307 BAR PRESS, INC., 84 LAFAYETTE STREET, NEW YORK 13, N. Y. — WA 5-3432

INDEX

	PAGE
Interest of the *amicus curiae*	1
Statement	3
Questions Presented	4
Summary of Argument	4
Argument	
I. Congressional intent to supersede state law should never be held unless clearly manifested	10
A. The Taft-Hartley Act contains no express declaration of a congressional intent to preclude state regulation	11
B. Decisions of this Court precluding state regulation of labor disputes over which the National Board asserts jurisdiction are based upon potentials of conflict not present where the National Board has declined jurisdiction	12
II. State regulation of labor disputes affecting interstate commerce is permissible where the National Board has declined jurisdiction	16
A. State regulation of local matters is not precluded where the powers delegated to a federal agency have not been exercised	17
B. Affirmative cession of jurisdiction by the National Board, under §10(a) of the Taft-Hartley Act, is not necessary where the National Board has refused jurisdiction	24

PAGE

C. It would be unreasonable and unrealistic to impute to Congress an intention to create a vast no-man's land in which thousands of labor disputes would be left wholly unregulated 29

III. A formal declination of jurisdiction by the National Board over the specific labor dispute is not necessary. The states may act when it is clear that the employer's operations do not meet the National Board's jurisdictional standards and that application to the National Board would be futile 33

Conclusion 39

Appendix A Table showing the distribution of business enterprise on the basis of number of persons employed 40

CITATIONS

Cases:

Alabama State Fed. of Labor v. McAdory, 325 U. S. 450 11
Algoma Plywood Co. v. Wisconsin Board, 336 U. S. 301 ..... 12, 29
Allen Bradley Local v. Wisconsin Board, 315 U. S. 740 ..... 11, 23
Almeida Bus Lines, Matter of, 99 N.L.R.B. 498 14
Amalgamated Clothing Workers v. Richman Bros., 348 U. S. 511 ..... 36, 37
Amalgamated Streetcar Employees v. Wisconsin Board, 340 U. S. 383 ..... 13, 25
Ass'n of Westinghouse Employees v. Westinghouse Electric Corp., 348 U. S. 437 12

PAGE

Benton, Inc. v. Painters Local 333, 291 P. (2d) 13 33
Bethlehem Steel Co. v. N.Y.S.L.R.B., 330 U. S. 767 ..... 5, 10, 11, 12, 13, 14, 15, 17, 18, 23, 27, 28, 29, 35
Bonwit Teller, Inc., Matter of, 4 N.Y.S.L.R.B. 945, enforced (not officially reported) 5 Labor Cases, ¶60,899, 9 L.R.R.M. 765 27
Breeding Transfer Co., Matter of, 110 N.L.R.B. 493 ..... 6, 23, 29, 31, 34
Buffalo General Laundries, Matter of, 11 N.Y.S.L.R.B. 275 37
Buffalo Industrial Bank, Matter of, 11 N.Y.S.L.R.B. 205 37
Building Trades Council v. Kinard Constr. Corp., 346 U. S. 933 ..... 13, 25, 35

California v. Thompson, 313 U. S. 109 ..... 21, 23
California v. Zook, 336 U. S. 725 ..... 11, 21
Cloverleaf Butter Co. v. Patterson, 315 U. S. 148 11
Compressed Air etc. Union, Matter of, 93 N.L.R.B. 1646 14
Consolidated Edison Co. v. N.L.R.B., 305 U. S. 197 2

Davega City Radio Stores, Inc. v. N.Y.S.L.R.B., 281 N. Y. 13 2

Eichholz v. P.S.C. of Missouri, 306 U. S. 268 21

Garner v. Teamsters, 346 U. S. 485 ..... 12, 13, 25, 26
Grandview Dairy, Matter of, 11 N.Y.S.L.R.B. 112 37
Guss v. Utah State Labor Relations Board, 296 P. (2d) 1, 45 Cal. (2d) 657, cert. granted 100 L. ed. (Advance p. 600) 33

Haleston Drug Stores, Inc. v. N.L.R.B., 187 F. 2d 418, review den. 342 U. S. 815 ..... 3, 20, 26

PAGE

Hoffman Packing Co., Inc., Matter of, 12 N.Y.S.L.R.B. 512 37
Hollow Tree Lumber Co., Matter of, 91 N.L.R.B. 635 3

Illinois Central R. Co. v. Public Utilities Comm., 245 U. S. 493 11
Imperial Engraving Co., Inc., Matter of, 12 N.Y.S. L.R.B. 559 37

J. L. Brandeis & Sons, Matter of, 53 N.L.R.B. 352, enforced 142 F. 2d 977 27

Kelly v. Washington, 302 U. S. 1 ..... 11, 21, 23
King Brooks, Inc., Matter of, 84 N.L.R.B. 652 14

La Crosse Tel. Co. v. Wisconsin Board, 336 U. S. 18 ..... 12, 13, 25

Marshall Field & Co., Matter of, 34 N.L.R.B. 1, enforced 129 F. 2d 169, affd. 318 U. S. 253 27
Mauer v. Hamilton, 309 U. S. 598 11
May Dep't Stores Company, Matter of, 53 N.L.R.B. 1366, enforced 146 F. 2d 66, affd. 326 U. S. 376 27
Mervin Wave Clip Co., Matter of, 114 N.L.R.B. 157 14
Metro Hoist & Body Co., Inc., Matter of, 14 N.Y.S. L.R.B. 308 37
Mintz v. Baldwin, 289 U. S. 346 21
Missouri Pacific Ry. Co. v. Larabee Flour Mills Co., 211 U. S. 612 ..... 17, 22
Modern Cleaners Co., Matter of, 13 N.Y.S.L.R.B. 342 37
Montgomery Ward & Co., Inc., Matter of, 5 N.Y.S. L.R.B. 441, enforced 179 Misc. (N. Y.) 298, affd. 266 App. Div. (N. Y.) 878 27

PAGE

National Container Corp., Matter of, 87 N.L.R.B. 1065 14
N.L.R.B. v. Daboll, 216 F. 2d 143, cert. den. 348 U. S. 917 3
N.L.R.B. v. Denver Bldg. Trades Council, 341 U. S. 675 3, 20, 30
N.L.R.B. v. Fainblatt, 396 U. S. 601 3, 30
N.L.R.B. v. Guy F. Atkinson Co., 195 F. 2d 141 14
N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U. S. 1 3, 10, 37
N.Y.S.L.R.B. v. Holland Laundry, Inc., 294 N. Y. 480 2
N.Y.S.L.R.B. v. Wags Transp. Corp., 130 N. Y. S. (2d) 731, affd. 284 App. Div. (N. Y.) 883 25
Northwestern Bell Tel. Co. v. Nebraska Ry. Comm., 297 U. S. 471 18, 19, 32

Oil Transport, Inc., Matter of, 106 N.L.R.B. 1321 14
Olin Mathieson Chem. Corp., Matter of, 115 N.L.R.B. No. 245, 38 L.R.R.M. 1099 14

Plankinton Packing Co. v. Wisconsin Board, 338 U. S. 953 12
Polish National Alliance v. N.L.R.B., 322 U. S. 643 37
Progressive Mine Workers v. N.L.R.B., 189 F. 2d 1, cert. den. 342 U. S. 868 3

Raisch Motors, Matter of, 18 N.Y.S.L.R.B. 94 2
Reid v. Colorado, 187 U. S. 137 11
Retail Clerks Union v. Your Food Stores of Santa Fe, Inc., 225 F. 2d 659 25, 35
Rothenberg v. N.Y.S.L.R.B., 21 L.R.R.M. 2142, affd. 273 App. Div. (N. Y.) 884 37

San Diego Bldg. Trades Council v. Garmon, 291 P. (2d) 1, 45 Cal. (2d) 657, cert. granted 100 L. ed. (Advance p. 600) 33

PAGE

Savage v. Jones, 225 U. S. 501 23
Screw Machine Products Corp., Matter of, 94 N.L.R.B. 1609 14
Seymour Products, Inc., Matter of, 12 N.Y.S.L.R.B. 46 37
Stewart Warner Co. v. N.L.R.B., 194 F. 2d 207 14

Terminal R. R. Ass'n v. Bro. of R. Trainmen, 318 U. S. 1 ..... 18, 21
T-H Products Co., Matter of, 113 N.L.R.B. 1246 14

United Auto Workers v. O'Brien, 339 U. S. 454 ..... 12, 25
United Auto Workers v. Wisconsin Board, 336 U. S. 245 ..... 11, 12, 23, 32
United Auto Workers v. Wisconsin Board,——U. S. .——, 100 L. ed. (Advance p. 666) 12
United Constr. Workers v. Laburnum Constr. Corp., 347 U. S. 656 ..... 12, 15, 26, 32

Weaver Wintark, Matter of, 87 N.L.R.B. 351 14
Weber v. Anheuser-Busch, Inc., 348 U. S. 468 ..... 12, 13, 25, 37
Welch Co. v. New Hampshire, 306 U. S. 79 ..... 11, 17, 18, 20
Wickard v. Filburn, 317 U. S. 111 30

Yellow Cab Co., Matter of, 93 N.L.R.B. 766 14

Federal Statutes:

National Labor-Management Relations Act of 1947 (61 Stat. 136) 29 U. S. C. (Supp. III) §141 et seq. 3, 4
Sec. 1 10
Sec. 2(6) 3
Sec. 2(7) 3
Sec. 10(a) 6, 7, 24, 25, 26, 27, 28
Sec. 10(b) 14
Sec. 10(c) 26
Sec. 14(b) 12
Sec. 303 12

PAGE

State Statutes:

New York State Labor Relations Act (30 McKinney's Consolidated Laws of New York, §§700-716 1
Sec. 700 2

Miscellaneous:

Bott, George J., *Speech before the Arkansas Bar Assn.*, May 13, 1954, 34 L. R. R. 78 15

County Business Patterns, Part I, First Quarter, 1953 (U. S. Dept. of Commerce and Dept. of Health, Education and Welfare) 30, 40, 41
Cox and Seidman: *Federalism and Labor Relations*, 64 Harv. Law Review, No. 2 (1950) 211, 216 ..... 16, 34

Geyls, *The National Labor Relations Board Jurisdictional Standards, A Problem in Federalism*, XVI Revista Del Colegio De Abogados de Puerto Rico (1955) 31 16

Hearings before Senate Comm. on Labor and Public Welfare on S. 249, 81st Cong., 1st Sess., p. 177 24
Hearings before Senate Comm. on Expenditures in the Executive Depts. on S. Res. 248, 81st Cong., 2d Sess., p. 35 24
Hearings before House Comm. on Expenditures in the Executive Depts. on H. Res. 512 and H. Res. 516, 81st Cong., 2d Sess., p. 109 24
Hearings before the Joint Committee on Labor Management Relations, 80th Cong., 2d Sess., p. 45 24
H. Rep. No. 510, 80th Cong., 1st Sess. 12
H. Rep. No. 2050, 80th Cong., 2d Sess. 24

Killingsworth: *State Labor Relations Act: A Study of Public Policy* (University of Chicago) 30

PAGE

National Labor Relations Board
15th Annual Report (1950) 4, 24
19th Annual Report (1954) 4, 24
Brief amicus curiae in Bethlehem Steel Co. v. N.Y.S.L.R.B. 14, 15, 35
Memorandum filed in United Constr. Workers v. Laburnum Constr. Corp. 15
Agreement with New York Board under Wagner Act 27
New York State Dept. of Commerce Survey of Business Forms N. Y. Herald Tribune, July 25, 1951 ..... 30, 31

Rosenthal: Exclusions of Employees under the Taft-Hartley Act, 4 Industrial and Labor Relations Review (1951) 556 30

Senate Rep. No. 105, 80th Cong., 1st Sess., Parts I and II 28
Senate Rep. 986, Part 3, 80th Cong., 2d Sess. 24, 34, 36
Senate Rep. No. 99, 81st Cong., 1st Sess. 24, 28

IN THE

Supreme Court of the United States

October Term—1956

No. 280

P. S. GUSS, doing business as PHOTO SOUND PRODUCTS MANUFACTURING COMPANY,
Appellant

v.

UTAH LABOR RELATIONS BOARD
Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR THE NEW YORK STATE LABOR RELATIONS BOARD AS *AMICUS CURIAE*

This brief is submitted on behalf of the New York State Labor Relations Board, as *amicus curiae*, pursuant to Rule 42(4) of the Rules of this Court.

The New York Board, a quasi-judicial agency of the State of New York, administers and enforces the New York State Labor Relations Act.[1] The New York State Labor Relations Act is an exercise of the State's police power for

[1] New York State Labor Law, 30 McKinney's Consolidated Laws of New York, §§700-716.

the benefit and protection of the health, safety and welfare of its citizens,[2] and is substantially identical to the National Labor Relations Act of 1935.[3]

The broad statutory and policy objectives of the New York State Labor Relations Act are set forth in Section 700 thereof (Findings and Policy) in comprehensive and meaningful terms. It perhaps is unnecessary at this point to detail the statewide responsibilities of this administrative agency, or to include the formidable problems which impel its deep interest in this case.

The New York State Board presently is processing 1800 cases a year. An important part of these labor disputes arises out of matters over which the National Board, by its jurisdictional standards, lawfully has relinquished jurisdiction. In sum, the New York Board feels that by processing these cases it thus is continuing and extending its contribution, which commenced in 1937, to collective bargaining, industrial peace and industrial growth in the state.

The Board's view in this regard was succinctly set forth in *Matter of Raisch Motors*, 18 N. Y. S. L. R. B. 94, 96-97:

> "Where the National Board refuses to assert jurisdiction, labor disputes must be subject to regulation by the states, or they will not be regulated at all. Labor disputes may or may not substantially affect interstate commerce, but they invariably have an immediate and direct impact upon the local community in which they occur. We do not believe that Congress

---

[2] New York Labor Law, §700.

[3] *Davega City Radio Stores, Inc.* v. *N.Y.S.L.R.B.*, 281 N. Y. 13, 22; *N.Y.S.L.R.B.* v. *Holland Laundry, Inc.*, 294 N. Y. 480, 492-3; *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U. S. 197, 222-223.

which granted the National Board discretionary power to decline jurisdiction ever intended to prevent the states, when that occurs, from taking necessary steps to protect their own safety, health and welfare."

Statement

The jurisdiction conferred upon the National Labor Relations Board by the National Labor Relations Act[4] extends to all labor disputes which affect interstate commerce.[5] However, the exercise of this full jurisdiction by the National Board is not mandatory. Throughout its existence, the National Board has refused "to exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress," and has limited "that exercise to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce."[6] The National Board's power to withhold jurisdiction has been upheld by the federal courts.[7]

For many years the National Board's declinations of jurisdiction were on a case by case basis. In October, 1950, however, the National Board established and announced detailed jurisdictional standards specifying the types of

---

[4] 61 Stat. 136 (1947), 29 U.S. C. (Supp. III) §141 et seq., hereinafter called the Taft-Hartley Act.

[5] Taft-Hartley Act, §2(6), (7). *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; *N.L.R.B.* v. *Fainblatt*, 306 U. S. 601.

[6] *Hollow Tree Lumber Co.*, 91 N.L.R.B. 635, 636.

[7] *N.L.R.B.* v. *Denver Bldg. Trades Council*, 341 U. S. 675, 684; *Haleston Drug Stores, Inc.* v. *N.L.R.B.*, 187 F. 2d 418; review den. 342 U. S. 815; *Progressive Mine Workers* v. *N.L.R.B.*, 189 F. 2d 1, cert. den. 342 U. S. 868; *N.L.R.B.* v. *Daboll*, 216 F. 2d 143, cert. den. 348 U. S. 917.

enterprises over which it would assert jurisdiction thereafter.[8] In July, 1954, it established and published amended and more restrictive standards, which are still in effect.[9]

Questions Presented

The basic question presented is whether the states may regulate labor disputes which affect interstate commerce, but over which the National Board refuses to assert jurisdiction on the ground that the matters involved are predominantly local in nature.

If the foregoing question is answered in the affirmative, a subsidiary question is presented, namely, may the states act where it appears that the employer's operations fail to meet the National Board's jurisdictional standards, or is state regulation permissible only after the National Board formally has rejected jurisdiction over the specific labor dispute?

Summary of Argument

POINT I

The field of labor relations traditionally has been a matter of local concern and within the power of the states legally and practically to regulate.

Under long-established principles, a Congressional intent to supersede state law should never be found unless clearly manifested. The Taft-Hartley Act contains no express declaration of a congressional intent to preclude state regulation. Congress left much to the states, and it

---

[8] *N.L.R.B. 15th Annual Report* (1950), pp. 5-7.
[9] *N.L.R.B. 19th Annual Report* (1954), pp. 3-5.

is necessary to spell out from conflicting indications of congressional will the areas in which state regulation is permissible.

This Court, in a series of decisions, has found an implied intent to preclude state regulation of labor disputes over which the National Board *will assert* jurisdiction. The rationale of those decisions is based upon the conflict, actual or potential, inherent where the federal and state governments exercise *concurrent* jurisdiction over the same employment relationship. That rationale is inapplicable here, for the frictions, uncertainties and potential conflicts arising from the application of dual controls are non-existent where the National Board refuses to exercise jurisdiction.

POINT II

A

State regulation of labor disputes affecting interstate commerce is permissible where the National Board has refused jurisdiction.

Where federal law "leaves the employer-employee relationship free of regulation in some aspects, it implies that in such matters federal policy is indifferent, and since it is indifferent to what the individual of his own volition may do, we can only assume it to be equally indifferent to what he may do under the compulsion of the state." (*Bethlehem Steel Co.* v. *N.Y.S.L.R.B.*, 330 U. S. 767 at 773.)

Similarly, state regulation of local matters affecting interstate commerce is not precluded where the powers delegated to a federal administrative agency lie dormant and

unexercised. The mere grant by Congress, to a federal agency, of powers in respect to interstate commerce does not of itself, and in the absence of action by the agency, interfere with the authority of the state to make those regulations which are conducive to the welfare and convenience of its citizens. In the absence of specific action by the federal agency, the control of the state over local matters remains undisturbed. State regulation is permissible even where federal administrative regulation has been authorized, adopted and is only awaiting its effective date. The permissibility of state regulation is even more evident here, where the declination of jurisdiction by the National Board leaves all aspects of the employment relationship unregulated and constitutes an express disclaimer of both federal interest and contemplated federal action.

In declining jurisdiction, the National Board "is defining the limits of [its] jurisdiction pursuant to the discretionary power vested in [it] by the Congress." (*Breeding Transfer Co.*, 110 N.L.R.B, 493, 497). If Congress had excluded local labor disputes from the coverage of the Taft-Hartley Act, the states would be free to act in the area beyond the line drawn by Congress. Where Congress has delegated that line-drawing power, the same result must follow. To hold otherwise would be to give the exercise of the delegated power greater effect than if Congress, itself, had exercised the power in the first instance.

B

Affirmative cession of jurisdiction by the National Board, under §10(a) of the Taft-Hartley Act, is not necessary where the National Board has refused jurisdiction. In such cases, state power is restored by operation of law, not by agreement.

Section 10(a) was not enacted as a limitation on the power of the National Board to enter into cession agreements with state agencies, but to eliminate any doubt as to the power of the Board to enter into such agreements. Not one of the decisions of this Court, barring state regulation, was based upon §10(a). To the contrary, this Court has indicated that the provisions of §10 appear to contemplate a remedy to supplement, rather than to substitute for, existing ones.

The National Board's power to refuse jurisdiction over predominantly local matters in all states and territories should not be confused with its power to cede jurisdiction over cases which it ordinarily would process, but which it may prefer to transfer to available state agencies administering consistent statutes. Where the National Board *would* assert jurisdiction, a cession agreement is a condition precedent to state regulation, for it is necessary to avoid potential conflict and to insure uniformity of law in matters as to which federal policy is not indifferent. Where the National Board *refuses* jurisdiction, because of the local nature of the matters involved, there is no dual jurisdiction, no possibility of shopping for a forum, and no potentials of conflict. Only state authority remains to effectuate the public interest in the maintenance of industrial peace, and the state then provides the only forum available to the parties.

C

It would be unreasonable and unrealistic to impute to Congress an intention to create a vast no-man's land in which thousands of labor disputes would be wholly unregulated. Congress, in 1947, was well aware of the National Board's policy of refusing to assert its jurisdiction "to

the hilt." Indeed, Congressional Committees had criticized the Board for its failure to restrict even further the area in which it asserted jurisdiction.

Approximately 90.6 per cent of all business enterprises employ less than 20 persons. It is in this area of "small business" that the National Board generally declines jurisdiction. While labor disputes in this area may not have a sufficiently substantial effect upon interstate commerce to warrant the intervention of federal power, they have an immediate, direct and substantial effect upon the health, safety, welfare and convenience of the local communities in which they occur. To hold that the states may not act, where the National Board declines to do so, would relegate the parties to the use of industrial and economic warfare, a result obviously contrary to the public policies and best interests of the nation and the states. The declination of jurisdiction by the National Board cannot be read as authorizing the parties to labor disputes to fix their own rules of industrial warfare in defiance of state power. The doubtful constitutionality of the Taft-Hartley Act, if so construed, precludes acceptance of such a construction.

POINT III

A formal declination of jurisdiction over the specific labor dispute is not necessary where it is clear that the employer's operations do not meet the National Board's jurisdictional standards.

The purpose of the standards published by the National Board was to notify the public, *in advance,* of the types of enterprises over which jurisdiction would be asserted, and thus permit the Board to devote its time, energies and budgetary allotment to matters which substantially affect

interstate commerce and are of real federal significance. A requirement that the National Board must formally decline jurisdiction over each particular labor dispute would defeat the purposes of the standards. It would encumber the Board with unnecessary work and expense, add to its backlog of cases, and seriously delay the processing of local labor disputes by the states.

A penumbral area is inevitable under a federal system, but the existence of some doubtful, border-line cases cannot upset an otherwise lawful and practical allocation of jurisdiction between the federal and state governments. It must be assumed that state authorities will recognize and honor the line of demarcation between exclusive federal and allowable state jurisdiction. If doubt exists, state jurisdiction will be declined and the parties referred to the National Board. Where state jurisdiction is asserted, the decision will be subject to review by this Court.

ARGUMENT.

POINT I

Congressional intent to supersede state law should never be held unless clearly manifested.

A. The Taft-Hartley Act contains no express declaration of a congressional intent to preclude state regulation.

B. Decisions of this Court precluding state regulation of labor disputes over which the National Labor Relations Board will assert jurisdiction are based upon potentials of conflict not present where the National Board has declined jurisdiction.

The field of labor relations traditionally has been a subject of local concern, regulated by the states. Recent federal regulation thereof is not based upon a direct interest in that field, but, indirectly, through the federal power to regulate interstate commerce (Taft-Hartley Act, Section 1, 29 U.S.C.A. §151; *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1). As this Court said in *Bethlehem Steel Co.* v. *N.Y.S.L.R.B.*, 330 U. S. 767, 772:

> "* * * labor relations are primarily of interest to the state, are within its competence legally and practically to regulate, and until recently were left entirely to state control. Thus, the subject matter is not so 'intimately blended and intertwined with responsibilities of the national government' that its nature alone raises an inference of exclusion."

A. The Taft-Hartley Act contains no express declaration of any intent to preclude state action where federal jurisdiction is declined.

Even where interstate commerce is directly involved, it has long been established that

> "In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution * * * it should never be held that Congress intends to supersede or suspend the exercise of the reserve powers of a State, even where that may be done, unless and except so far as, its purpose to do so is clearly manifested." (*Welch Co.* v. *New Hampshire*, 306 U. S. 79, 85.)[10]

The Taft-Hartley Act contains no express declaration of a congressional intent to supersede state power. In *U.A.W.* v. *Wisconsin Board*, 336 U. S. 245, 252, this Court pointed out that

> "Congress has not seen fit in either of these Acts [Wagner and Taft-Hartley Acts] to declare either a general policy or to state specific rules as to their effects on state regulation of various phases of labor relations over which the several states traditionally have exercised control."

To same effect, see *Bethlehem Steel Co.* v. *N.Y.S.L.R.B.*, 330 U. S. 767 at 771.

[10] See, to same effect, *Illinois Central R. Co.* v. *Public Utilities Commission*, 245 U. S. 493, 510; *Allen Bradley Local* v. *Wisconsin Board*, 315 U. S. 740, 749; *U.A.W.* v. *Wisconsin Board*, 336 U. S. 245, 253; *California* v. *Zook*, 336 U. S. 725, 733; *Alabama State Fed. of Labor* v. *McAdory*, 325 U. S. 450, 467; *Kelly* v. *Washington*, 302 U. S. 1, 10-14; *Reid* v. *Colorado*, 187 U. S. 137, 148; *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, 156; *Mauer* v. *Hamilton*, 309 U. S. 598, 614.

More recently, in *Garner* v. *Teamsters*, 346 U. S. 485, 488, this Court said:

> "The National Labor-Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible."[11]

B. Decisions of this Court precluding state regulation of labor disputes over which the National Labor Relations Board will assert jurisdiction are based upon potentials of conflict not present where the National Board has declined jurisdiction.

Although the Taft-Hartley Act contains no express declaration of a congressional intent to bar state regulation, this Court, in a series of decisions, has found an implied congressional intent to preclude state regulation of various categories of labor disputes (*Bethlehem Steel Co.* v. *New York Bd.*, 330 U. S. 767; *La Crosse Tel. Co.* v. *Wisconsin Bd.*, 336 U. S. 18; *Plankinton Packing Co.* v. *Wisconsin Bd.*, 338 U. S. 953; *U.A.W.* v. *O'Brien*, 339 U. S.

---

[11] Subsequently quoted in *United Constr. Workers* v. *Laburnum Constr. Corp.*, 347 U. S. 656, 664, and in *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 480. The areas in which state action is permissible include (1) prohibition of violence, mass picketing and disorderly conduct (*U.A.W.* v. *Wisconsin Board*,——U. S.——, 100 L. ed. (Advance, p. 666); (2) regulation of union security clauses (Taft-Hartley Act, §14 (b); *Algoma Plywood Co.* v. *Wisconsin* Board, 336 U. S. 301); (3) activities neither prohibited nor protected by the Taft-Hartley Act (*U.A.W.* v. *Wisconsin Board*, 336 U. S. 245); (4) actions for damages caused by unlawful secondary boycotts and jurisdictional disputes (Taft-Hartley Act, §303); (5) actions for damages caused by tortious, primary picketing (*United Construction Workers* v. *Laburnum Constr. Corp.*, 347 U. S. 656; (6) actions for breach of a collective agreement (H.R. Rep. No. 510, 80th Congr., 1st Sess., pp. 41-42; *Assn. of Westinghouse Employees* v. *Westinghouse Electric Corp.*, 348 U. S. 437).

454; *Amalgamated Street Car Employees* v. *Wisconsin Bd.*, 340 U. S. 383; *Garner* v. *Teamsters*, 346 U. S. 485; *Bldg. Trades Council* v. *Kinard Constr. Co.*, 346 U. S. 933; *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468).

In each of the cited cases, however, the state had claimed and asserted *concurrent* jurisdiction over a labor dispute as to which the National Board concededly had, and *would assert*, jurisdiction. The importance of that distinguishing factor has been recognized by this Court, which has been careful to emphasize that "The election of the National Board to decline jurisdiction in certain types of cases, for budgetary or other reasons, presents a different problem which we do not now decide." (*Bethlehem Steel Co.* v. *N.Y.S.L.R.B.*, 330 U. S. at 776. See, to same effect, *Garner* v. *Teamsters*, 346 U. S. 485, 488, and *Building Trades Council* v. *Kinard Construction Co.*, 346 U. S. 933.)

The rationale underlying this Court's decisions barring *concurrent* state jurisdiction clearly is inapplicable where the National Board has refused jurisdiction. The vice of dual jurisdiction, this Court said, is in the "potentials of conflict" between decisions and policies of the National Board and the state boards (*La Crosse* case, 336 U. S. at 26). Thus, "If the two boards [federal and state] attempt to exercise a concurrent jurisdiction, * * * action by one necessarily denies the discretion of the other. The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict" (*Bethlehem* case, 330 U. S. at 776). And in *Garner* v. *Teamsters*, the Court said that these same reasons require the exclusion of action by state courts in like matters. (346 U. S. at 491. See also, *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 474-476.)

Manifestly, that rationale is not germane in situations where the National Board refuses jurisdiction, for the vexatious problems of concurrent jurisdiction are then eliminated. When the National Board has declined to act there can be no dual assertion of jurisdiction, no potentials of conflict, and no possibility of "shopping for a forum." The state then is the only authority left to effectuate the public interest in the maintenance of industrial peace, and the state forum provides the only remedy available to the parties.[12]

The rationale adopted by the Supreme Court was urged in the brief filed by the United States as *amicus curiae* in the *Bethlehem* case. That brief, however, recognized that the rationale was not applicable to cases in which the National Board refused to assert jurisdiction. Thus, it was there stated (brief of United States as *amicus curiae*, p. 69):

---

[12] A change in policy, and expansion of its jurisdiction, by the National Board would not result in conflict. In representation proceedings, the National Board, in the past, has given effect to elections conducted by local agencies and officials (*Olin Mathieson Chem. Corp.*, 115 N.L.R.B. No. 245; 38 LRRM 1099; *Mervin Wave Clip Co.*, 114 N.L.R.B. 157; *T-H Products Co.*, 113 N.L.R.B. 1246; *Oil Transport, Inc.*, 106 N.L.R.B. 1321; King Brooks, Inc., 84 N.L.R.B. 652, 653; *National Container Corp.*, 87 N.L.R.B. 1065, 1066-7; *Weaver Wintark*, 87 N.L.R.B. 351, 362. See also, *Stewart Warner Co.* v. *N.L.R.B.*, 194 F. 2d 207, 210). New proceedings, of course, would be filed with the National Board. In unfair labor practice proceedings, the National Board has refused to give retroactive effect to a change in policy extending its jurisdiction. It has declined to proceed where the alleged unfair labor practices occurred at a time when the employer's operations did not meet its then effective jurisdictional standards (*Yellow Cab Co.*, 93 N.L.R.B. 766; *Screw Machine Products Co.*, 94 N.L.R.B. 1609; *Almeida Bus Lines*, 99 N.L.R.B. 498; *Compressed Air, etc. Union*, 93 N.L.R.B. 1646; *N.L.R.B.* v. *Guy F. Atkinson Co.*, 195 F. 2d 141). Moreover, §10(b) of the Taft-Hartley Act would bar the National Board from processing unfair labor practices more than six months old.

> "* * * The friction, confusion and uncertainty arising from the application of dual controls, to which we have referred, are non-existent where the National Board will not exercise its jurisdiction. The National Board accordingly believes that the mere existence of the National statute should not deprive the states of power to apply a similar policy to employers over whom the National Board does not take jurisdiction."

In May, 1954, George J. Bott, then General Counsel to the National Board, re-affirmed that statement, saying (34 L. R. R. M. 78, 80):

> "The problem which emerges is this: if the activity affects interstate commerce but the Board declines to assert its jurisdiction, is there a no-man's land created where the states cannot act and the Board will not act? In practice the Board never has, and I think I may confidently predict it never will, interfere to block state action in a situation where the Board chooses to stay its hand because it believes the impact of the activity on commerce to be insubstantial. Yet the question may nevertheless arise should a private party choose to challenge the power of the state to act in such a situation * * *. To me it seems clear that as a matter of policy there is no reason why a state should not be free to act in this situation. Once it is recognized that Congress has authorized the Board in its discretion to withhold the full exercise of its jurisdiction, I cannot see any considerations of policy which make it necessary or desirable to exclude the states from any field that the Board properly abnegates in this way."[13]

---

[13] The memorandum submitted by the National Board to this Court in *United Construction Workers* v. *Laburnum Constr. Corp.* (347 U. S. 656), states (p. 11) that the National Board, "as a matter of practice repeatedly refrained from intervening in any way in situations where the States, despite the absence of any cession agreement, have taken action with respect to industries over which the Board as a matter of policy declines to take jurisdiction."

See also, the National Board's brief *amicus curiae* in *Bethlehem Steel Company* v. *N.Y.S.L.R.B.* (330 U. S. 767) pp. 69-70, quoted *infra*, p. 35, n. 36.

See, to the same effect, Cox and Seidman, *Federalism and Labor Relations*, 64 Harvard Law Review, No. 2 (1950) 211 at 216; Geyls: *The National Labor Relations Board Jurisdictional Standards: A Problem in Federalism*, XVI Revista Del Colegio De Abogados de Puerto Rico (1955) 31.

It is clear, therefore, that the Taft-Hartley Act contains no express declaration of a congressional intent to supersede state regulation of labor disputes, and that decisions precluding state regulation where the National Board has, and will assert, jurisdiction are not apposite here.

POINT II

State regulation of labor disputes affecting interstate commerce is permissible where the National Board has declined jurisdiction.

A. State regulation of local matters is not precluded where the powers delegated by Congress to a federal agency have not been exercised.

B. Affirmative cession of jurisdiction by the National Board, under §10(a) of the Taft-Hartley Act, is not necessary where the National Board has refused jurisdiction.

C. It would be unreasonable and unrealistic to impute to Congress an intention to create a vast no-man's land in which thousands of labor disputes would be left wholly unregulated.

Although this Court has not ruled on the power of the states to regulate labor disputes over which the National Board has refused jurisdiction, pertinent decisions of this Court, and the principles of constitutional law enunciated therein, clearly indicate the propriety of state regulation under such circumstances.

A. State regulation of local matters is not precluded where the powers delegated by Congress to a federal agency have not been exercised.

Basic, of course, is the primary principle that supersedure should never be held, even where that may be done, unless and except so far as a congressional purpose to do so is clearly manifested (*Welch Co.* v. *New Hampshire*, 306 U. S. 79). This fundamental principle, safeguarding the preservation of the states' reserve powers, has been held particularly pertinent, if not controlling, where, as here, the subject matter is one "primarily of interest to the state, * * * within its competence legally and practically to regulate * * *"[14] and where the delegated federal power lies "dormant and unexercised"[15] (*Missouri Pacific Ry. Co.* v. *Larabee Flour Mills Co.*, 211 U. S. 612, 623).

In the *Bethlehem* case, *supra*, this Court, discussing the doctrine of supersedure, said (330 U. S. at 773):

> "Where it [the National Act] leaves the employer-employee relation free of regulation in some aspects, it implies that in such matters federal policy is indifferent, and since it is indifferent to what the individual of his own volition may do we can only assume it to be equally indifferent to what he may do under the compulsion of the state."

---

[14] *Bethlehem Steel Co.* v. *New York Board*, 330 U. S. at 772.

[15] In the *Bethlehem* case, the Court stated that the situation there presented could not be treated as one in which federal power was "dormant and unexercised," since the National Board had not declined jurisdiction and its refusal to certify units of foremen "was a determination and an exercise of its discretion to determine that such units were not appropriate for bargaining purposes." (330 U. S. at 774-5)

Under the National Act, Congress has granted the National Board discretionary power to refuse jurisdiction where the impact on interstate commerce is not sufficiently substantial to warrant the exercise of federal power. Certainly declination of jurisdiction on that ground demonstrates federal "indifference" to the labor disputes involved, and, by the same token, to state regulation thereof.

Continuing, the *Bethlehem* opinion further states (330 U. S. at 774):

> "• • • even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulation, *Northwestern Bell Telephone Co.* v. *Nebraska State Commission, supra; Welch Co.* v. *New Hampshire, supra.* The states are in those cases permitted to use their police power in the interval. *Terminal Railroad Assn.* v. *Brotherhood of Railroad Trainmen,* 318 U. S. 1."

The foregoing quotation, and the cases cited therein, are particularly apposite here. The National Board's refusal to assert jurisdiction over the labor relations of particular industries or enterprises creates "separable and distinct segments" more clearly defined than the "segments" found in the cases cited in the *Bethlehem* opinion. In those cases, federal regulation was extensive, covering all major aspects of the subject matter. Nevertheless, state law was held applicable to a narrow phase of the same subject, not covered by federal administrative regula-

tion, *although federal regulation thereof was authorized, adopted and awaiting only its effective date.* Where the National Board has declined jurisdiction, the propriety of state regulation is even more evident, for the National Board's declination of jurisdiction leaves *all* aspects of the labor dispute unregulated by federal law, and affirmatively disclaims both federal interest and contemplated action.

In *Northwestern Bell Telephone Company* v. *Nebraska Ry. Comm.*, 297 U. S. 471, the Interstate Commerce Commission, pursuant to the Interstate Commerce Act, had prescribed a uniform system of accounts for telephone companies, but had not fixed depreciation rates. By amendment of that act, Congress directed the Commission, "as soon as practicable," to fix depreciation rates which, when established, were to be mandatory and exclusive. The congressional directive for prompt action, and the express provision that the federal regulation should be exclusive, stand in sharp contrast to the discretionary jurisdiction of the National Board and the absence of any express language of pre-emption in the Taft-Hartley Act. Despite the congressional directive and mandate, this Court upheld the right of the state to fix depreciation rates prior to effective action by the Interstate Commerce Commission. The Court there said (297 U. S. at 480):

> "In any event, we think that §20(5) cannot be read as authorizing the Interstate Commerce Commission to supplant state power to regulate depreciation rates except by prescribing a rate administratively determined by the Commission itself. A direction that the Commission, as soon as practicable, prescribe depreciation rates, is hardly to be read as authority to

permit the telephone companies to fix the rates for themselves in defiance of state power. The doubtful constitutionality of the statute if so construed precludes our acceptance of such a construction."

Where the National Board has been given power to decline jurisdiction, it may be said, with even greater justification, that it is hardly conceivable Congress could have intended that the exercise of this power should leave the labor disputes entirely unregulated and the parties thereto free to fix their own rules of industrial warfare. The practicalities of the situation, and the doubtful constitutionality of a federal law prohibiting the exercise of state police power over local matters, not federally regulated, manifestly "precludes * * * acceptance of such a construction."

In *Welch Company* v. *New Hampshire,* 306 U. S. 79, state regulations prohibited drivers of common and contract carriers from operating motor vehicles for more than twelve consecutive hours. Regulations adopted by the Interstate Commerce Commission, but not yet effective, prohibited a driver from remaining on duty for more than ten consecutive hours.

This Court, upholding the application of state law, pointed out that the federal commission was merely "authorized" to regulate that subject, and emphasized the distinction between "duty imposed and action permitted" (306 U. S. at 84). So, too, in the case at bar, there is the same distinction between a "duty imposed" upon the National Board and "action permitted" to it, for Congress granted the National Board discretionary power "to withhold jurisdiction" (*Haleston Drug Stores, Inc.* v. *N.L.R.B.,* 187 F. 2d 418, 422, review den. 342 U. S. 815; *N.L.R.B.* v.

Denver Bldg. Trades Council, 341 U. S. 675, 684). That distinction is even more significant here, for the National Board's declination of jurisdiction constitutes a clear disclaimer of both interest and contemplated action, whereas in the *Welch* case, state regulation was upheld even though federal administrative regulation was actually adopted and awaiting only its effective date.

In *California* v. *Thompson*, 313 U. S. 109, the question presented was the constitutionality of a California statute which required the licensing of anyone who "sells or offers to sell" transportation over the public highways of the state. Thompson had been convicted of violation thereof for arranging the transportation of passengers from California to Texas. The Federal Motor Carrier Act excluded from its coverage "casual, occasional or reciprocal transportation" of the type involved (49 U.S.C.A., Sec. 303 b). Although not mentioned in the opinion, the federal act gave the Interstate Commerce Commission power, in its discretion, to remove that exemption (see *California* v. *Zook*, 336 U. S. 725, 727, 742-743, 756). In the absence of an exercise of that power by the Interstate Commerce Commission, the Supreme Court treated the question as one involving "The constitutional authority of the state to regulate those who, within the state, aid or participate in a form of interstate commerce over which Congress has not undertaken to exercise its regulatory power" (313 U. S. at 112), and upheld the conviction.[16]

---

[16] See also, *Terminal R. R. Assn.* v. *Bro. of R. Trainmen*, 318 U. S. 1; *Eichholz* v. *Public Service Commission of Missouri*, 306 U. S. 268, 273; *Kelly* v. *Washington*, 302 U. S. 1, 9-14; *Mintz* v. *Baldwin*, 289 U. S. 346.

Thus, where the delegated federal power lies "dormant and unexercised," this Court has held state regulation permissible, even though federal administrative regulation was authorized, adopted, and awaiting only its effective date. This long-established principle was clearly and forcibly stated in *Missouri Pacific Ry. Co.* v. *Larabee Flour Mills Co.*, 211 U. S. 612, 623:

> "On the other hand, it is said that Congress has already acted,—has created the Interstate Commerce Commission, and given to it a large measure of control over interstate commerce. But the fact that Congress has intrusted power to that Commission does not, in the absence of action by it, change the rule which existed prior to the creation of the Commission. Congress could always regulate interstate commerce, and could make specific provisions in reference thereto, and yet this has not been held to interfere with the power of the state in these incidental matters. A mere delegation by Congress to the Commission of a like power has no greater effect, and does not of itself disturb the authority of the state. It is not contended that the Commission has taken any action in respect to the particular matters involved. It may never do so, and no one can, in advance, anticipate what it will do when it acts. Until then the authority of the state in merely incidental matters remains undisturbed. *In other words, the mere grant by Congress to the Commission of certain national powers in respect to interstate commerce does not of itself, and in the absence of action by the Commission, interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens. Running through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce, and a delegation of that control to a commission, necessarily withdraws from the state all power in respect to regulations of a local character. This proposition*

> *cannot be sustained. Until specific action by Congress or the Commission, the control of the state over these incidental matters remains undisturbed.*" (Italics added.)

The logical basis of that principle, and the practical necessity therefor, are particularly apparent in its application to the question here presented. Here, there is far more than the mere negative failure of a federal agency to act. There is an express, affirmative declaration by the National Board that it will not act because the matters involved are predominantly local in nature and do not warrant the intervention of federal power.

In refusing jurisdiction, the National Board is "defining the limits of [its] jurisdiction pursuant to the discretionary power vested in [it] by the Congress." (*Breeding Transfer Co.*, 110 N.L.R.B. 493, 497.) There can be no doubt that if Congress itself had excluded local and borderline cases from the coverage of the Taft-Hartley Act, the states would be free to act in the area beyond the line drawn by Congress, for

> "There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside the limited field and otherwise admissible is not forbidden or displaced." (*Kelly* v. *Washington*, 302 U. S. 1, 10)[17]

Where Congress, instead of exercising that line-drawing power, delegated it to the National Board, the same result must necessarily follow. To hold otherwise

---

[17] See also, *Bethlehem Steel Co.* v. *N.Y.S.L.R.B.*, 330 U. S. at 776; *U.A.W.* v. *Wisconsin Bd.*, 336 U. S. 245, 254; *Allen Bradley Local* v. *Wisconsin Bd.*, 315 U. S. 740; *California* v. *Thompson*, 313 U. S. 109, 113; *Savage* v. *Jones*, 225 U. S. 501, 533.

would be to give the exercise of the delegated power greater effect than if the power had been exercised by Congress itself in the first instance.[18]

B. Affirmative cession of jurisdiction by the National Board, under §10(a) of the Taft-Hartley Act, is not necessary where the National Board has refused jurisdiction.

Section 10(a) provides as follows:

> "The Board is *empowered*, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is *empowered* by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where pre-

[18] In this connection, it should be noted that the National Board's discretionary curtailment of its jurisdiction and its promulgation and publication of jurisdictional standards, in 1950 and 1954 (NLRB, 15th Annual Report, pp. 5-6; 19th Annual Report, pp. 2-5) followed congressional criticism of the National Board's assertion of jurisdiction over predominantly local matters. 12th Interm. Report, House Committee on Expenditures in the Executive Departments, H. Rept. No. 2050, 80th Cong., 2d Sess., pp. 4-5; Report of the Joint Committee on Labor-Management Relations, S. Report 986, Part 3, 80th Cong., 2d Session, pp. 13-15; Report of Senate Committee on Labor and Public Welfare, S. Report, No. 99, 81st Cong., 1st Sess., p. 43. See also, for congressional approval of the National Board's declination of jurisdiction over local matters: Hearings before the Senate Committee on Labor and Public Welfare on S. 249, 81st Cong., 1st Sess., p. 177; Hearings before the Senate Committee on Expenditures in the Executive Departments on S. Res. 248, 81st Cong., 2d Sess., p. 35; Hearings before the House Committee on Expenditures in the Executive Departments on H. Res. 512 and H. Res. 516, 81st Cong., 2d Sess., p. 109; Hearings before the Joint Committee on Labor Management Relations, 80th Cong., 2d Sess., p. 45.

dominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith." (italics added)

It has been said that a cession agreement, pursuant to §10(a), provides the only method by which states can obtain jurisdiction, and that declination of jurisdiction by the National Board, standing alone, cannot confer state jurisdiction.[19] The argument is premised upon the assertion that §10(a) "withdrew from the National Board the authority it had exercised prior to 1947 to cede jurisdiction on its own terms" and that Congress, therefore, must have intended to bar state action in the absence of affirmative cession, even where the National Board refused jurisdiction.[20] This contention is without merit, finding no support in the language of §10(a), its history and purpose, or in decisions of this Court.

Not one of this Court's decisions barring state regulation was based upon §10(a). In each case, the basis of decision was the conflict, actual or potential, resulting from the state's assertion of concurrent jurisdiction.[21]

---

[19] E.g. *Retail Clerks Union* v. *Your Food Stores of Santa Fe, Inc.*, U.S.C.A.—10, 225 F. 2d 659; *N.Y.S.L.R.B.* v. *Wags Transp. Corp.*, 130 N.Y.S. (2d) 731, affd. on other grounds, 284 App. Div. (N. Y.) 883.

[20] *New York Board* v. *Wags Transp. Corp.*, 130 N.Y.S. (2d), 731, 743-744, aff'd on other grounds 284 App. Div. (N. Y.) 883.

[21] *La Crosse Tel. Co.* v. *Wisconsin Board*, 336 U. S. 18, 25-27; *U.A.W.* v. *O'Brien*, 339 U. S. 454, 458-459; *Amalgamated Street etc. Employees* v. *Wisconsin Board*, 340 U. S. 383, 394; *Garner* v. *Teamsters*, 346 U. S. 485, 490-491; *Bldg. Trades Council* v. *Kinard Constr. Corp.*, 346 U. S. 933; *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 480-1.

The first sentence in §10(a) "empowers," but does not require, the National Board to act (*Haleston Drug Stores, Inc.* v. *N.L.R.B.*, 187 F. 2d 418, 421, rev. den. 342 U. S. 815). The second sentence, excluding the proviso, provides that the power of the National Board to act "shall not be affected by any other means of adjustment or prevention * * *." This phrase, too, contains no statement, express or implied, that "other means of adjustment or prevention" are precluded. Its plain meaning is exactly the converse, namely, the fact that other means of adjustment and prevention exist shall not preclude the National Board from exercising its powers, if it so desires. Thus, in *Garner* v. *Teamsters,* 346 U. S. 485, 492-3, the Court said that this language "seems to contemplate a remedy to supplement, rather than to substitute for, existing ones." Again, in *United Construction Workers* v. *Laburnum Constr. Corp.*, 347 U. S. 656, 667, this Court, after referring to §10(a) pointed out that §10(c) "directs the Board to issue a cease and desist order after an appropriate finding of fact. There is no declaration that this procedure is to be exclusive." The Court further said (347 U. S. at 665), "The care we took in the Garner case to demonstrate the existing conflict between state and federal administrative remedies in that case, was itself a recognition that if no conflict existed, the state procedure would have survived."

Nor does the proviso, which "empowers" the National Board to enter into cession agreements, contain any indication that such an agreement is necessary in cases where the National Board declines to act at all. To the contrary, §10(a), read as a whole, clearly indicates that since the National Board may decline to act, and thus fix the bound-

aries of its jurisdiction, the provision permitting cession agreements must refer, and is limited, to the area in which the National Board exercises jurisdiction. If the cases upholding the power of the National Board to draw a national line, beyond which jurisdiction will not be exercised, are to be given their proper meaning in the complex of federal-state relationships today, then the area of declination legally must be equated with the area left free to regulation by the states. If the states are not free to act in that area, then the power to decline could not have been constitutionally permitted (*supra*, pp. 19-20).

This interpretation of the language of §10(a) is consistent with, and supported by, its history and purpose.

The proviso contained in §10(a) was *not* enacted as a limitation of the power of the National Board to cede jurisdiction. The National Labor Relations Act of 1935 contained no express authorization of cession agreements. The National Board, however, had entered into such agreements with state boards. The agreement between the National and New York boards is set forth in the appendix to *Bethlehem Steel Company* v. *New York Board*, 330 U. S. at 784-797. Thus, for example, the New York Board handled labor disputes involving New York department stores[22] although in other states, which had no state boards, such cases were handled by the National Board.[23]

---

[22] *Montgomery Ward & Co., Inc.*, 5 N.Y.S.L.R.B. 441, enforced 179 Misc. (N. Y.) 298, aff'd 266 App. Div. (N. Y.) 878; *Bonwit Teller, Inc.*, 4 N.Y.S.L.R.B. 945, enforced (not officially reported) 5 Labor Cases ¶60,899, 9 L.R.R.M. 765.

[23] *May Dept. Stores Company*, 53 N.L.R.B. 1366, enforced 146 F. 2d 66, aff'd 326 U. S. 376; *Marshall Field & Company*, 54 N.L.R.B. 1, enforced 129 F. 2d 169, aff'd 318 U. S. 253; *J. L. Brandeis & Sons*, 53 N.L.R.B. 352, enforced 142 F. 2d 977.

The opinion of this Court in *Bethlehem Steel Company* v. *New York Board*, decided in April, 1947, raised some doubt as to the National Board's power to enter into cession agreements (see separate opinion of Frankfurter, J., 330 U. S. at 777-778). The proviso in §10(a) was added in June, 1947, not to limit the National Board's power to cede jurisdiction, but to eliminate any doubt as to its authority to enter into such agreements (S. Rep. No. 105, 80th Cong., 1st Sess., Part I, p. 26, Part II, p. 38; S. Rep. 99, 81st Cong., 1st Sess., p. 43; 93 Cong. Rec. 6383-4).

Further, the argument that a cession agreement under §10(a) provides the sole method by which state jurisdiction may be "restored," fails to distinguish between (1) the power of the National Board to refuse jurisdiction over predominantly local matters in all states and territories, regardless of whether there are, or are not, available state agencies, and (2) its power, under §10(a) to cede jurisdiction over cases which the National Board ordinarily *would* process, but which it may prefer to transfer to available state agencies administering consistent statutes.

Manifestly, it is only where the National Board *would* assert jurisdiction that cession is necessary. In such cases, a cession agreement is required in order to avoid the potentials of conflict inherent in concurrent jurisdiction and to insure uniformity of law in matters as to which federal policy is not indifferent.

But where the National Board *refuses* jurisdiction, there is no dual jurisdiction and no possibility of shopping for a forum. In declining jurisdiction, the National Board

is "defining the limits of [its] jurisdiction pursuant to the discretionary power vested in [it] by the Congress."[24] Its action has the same effect as if Congress had excluded such matters from the coverage of the Act (pp. 23-24, *supra*). The refusal of jurisdiction is an affirmative declaration that federal policy is indifferent, and that national uniformity is not essential. As this Court said in the *Bethlehem* case (330 U. S. at 773), if federal policy "is indifferent to what the individual of his own volition may do we can only assume it to be equally indifferent to what he may do under the compulsion of the state." In such cases, therefore, state jurisdiction is permissible by operation of law, and no cession agreement is required. Where federal jurisdiction is declined, there is, *in fact*, no overlapping of federal and state law, and "where the State and federal laws do not overlap, no cession is necessary, because the State's jurisdiction is unimpaired." (*Algoma Plywood Co.* v. *Wisconsin Board*, 336 U. S. 301, 313.)

C. It would be unreasonable and unrealistic to impute to Congress an intention to create a vast no-man's land in which thousands of labor disputes would be left wholly unregulated.

If Congress had intended to bar state action where the National Board declines jurisdiction, it readily could have said so in clear and unambiguous language. Congress, however, has not done so, and it would be wholly unreasonable and unrealistic to impute such an intention to Congress. Particularly is that so since Congress, in 1947, was well aware of the National Board's policy of refusing to

[24] *Breeding Transfer Co.*, 110 N.L.R.B. 493, 497.

exercise its jurisdiction "to the hilt," and had criticized the National Board for its failure to restrict its jurisdiction even further.[25]

It has been estimated that 25 per cent of the non-agricultural labor force is employed in businesses over which the National Board does not assert jurisdiction.[26] In view of the reach of the commerce power,[27] it would seem that a major portion of this figure consists of employees over whom the National Board could, but declines to, assert jurisdiction.

The extent of this potential no-man's land is also reflected in the reports of governmental investigations as to the distribution of business enterprises on the basis of the number of persons employed. According to a joint study made by the Bureau of Old-Age and Survivors Insurance and the Bureau of the Census, approximately 90.6% of all businesses in the country employ less than 20 persons.[28]

New York is the leading industrial state in the nation, employing 12.1 per cent of the national working force. A survey made by the New York State Department of

---

[25] Note 18, p. 24, *supra.*

[26] Rosenthal, Exclusions of Employees under the Taft-Hartley Act, 4 Industrial & Labor Relations Review, 556, 564, 568, July, 1951; Killingsworth, State Labor Relations Acts: A Study of Public Policy (Univ. of Chicago) pp. 3-4.

[27] *Wickard* v. *Filburn,* 317 U. S. 111; *N.L.R.B.* v. *Fainblatt,* 306 U. S. 601; *Denver Bldg. Trades Council* v. *N.L.R.B.,* 341 U. S. 675.

[28] County Business Patterns, Part I, First Quarter, 1953, published by U. S. Departments of Commerce and Health, Education and Welfare, pp. 4-6, Table 1A. For statistics as to the individual states and territories, see Table 1B, pp. 8-52.

A table setting forth the distribution in each state and the District of Columbia is printed as Appendix A, hereto.

Commerce in 1951[29] showed that 446,130 firms (77% of the business establishments in the state) employed 3 persons or less; 503,560 firms (87%) employed 7 persons or less; and 547,370 firms (94%), employing less than 20 persons, accounted for 24% of the total employees in the state and 23.8% ($3,584,200,000) of the total payroll. The survey further disclosed that small business is not confined to any particular section of the state's economy, but is fairly uniform throughout all classifications. Businesses with less than 50 employees comprised 93% of all mining concerns, 98.7% of all construction firms, 97.6% of transportation firms, and 88.3% of manufacturing companies. In the distribution trades, firms employing less than 20 persons accounted for an estimated 90.5% of wholesalers, 97.9% of retailers, 96.4% of financial firms and 96.3% of all service businesses.

It is in this area of "small business" that the National Board generally declines jurisdiction.[30] While labor disputes in this area may not have a sufficiently substantial effect on interstate commerce to warrant the exercise of federal power, there can be no question that they have an immediate and direct effect upon the health, safety, welfare and convenience of the local communities in which they occur.

When the National Board refuses jurisdiction, only state authority is left for the protection of the public interest in the maintenance of industrial peace, and the state

---

[29] New York Herald-Tribune, July 25, 1951.

[30] Although the National Board's jurisdictional standards are phrased in terms of dollar volume of business, there is an obvious correlation between the gross revenue of an enterprise and the number of persons employed by it (*Breeding Transfer Co.*, 110 N.L.R.B. 493, 499, n. 4).

forum provides the only remedy available to the parties to the dispute. To hold that the states may not act would relegate the parties to the use of industrial and economic warfare, a result obviously contrary to the public policies and best interests of the nation and the states. This Court, in analogous cases, has refused to impute such an intention to the Congress. Thus, it has been held that conduct which is neither prohibited nor protected by the Taft-Hartley Act is subject to state regulation, for such conduct is "governable by the State or it is entirely ungoverned." (*U.A.W.* v. *Wisconsin Board*, 336 U. S. 245, 254.) Similarly, the states may provide a remedy for damages sustained where the Taft-Hartley Act provides only for injunctive relief (*United Constr. Workers* v. *Laburnum Constr. Co.*, 347 U. S. 656, 665).

Where federal power has been withheld on the ground that the matters involved are local in nature; where federal policy thus is "indifferent"; and where Congress has not expressly and unequivocally barred state action, it would be unreasonable, unrealistic and contrary to established precedents to impute to Congress an intention to deprive the states of their power to protect the health, safety and welfare of their citizens and to deprive the parties to labor disputes of any forum or remedy.

To paraphrase the language of this Court in *Northwestern Bell Tel. Co.* v. *Nebraska*, 297 U. S. 471, 480 (quoted *supra*, pp. 19-20), the declination of jurisdiction by the National Board, pursuant to power granted it by Congress, is hardly to be read as authority to permit parties to labor disputes to fix their own rules of industrial warfare in defiance of state power. The doubtful constitutionality of the Taft-Hartley Act, if so construed, precludes acceptance of such a construction.

POINT III

A formal declination of jurisdiction by the National Board over the particular labor dispute is not necessary. The states may act when it is clear that the employer's operations do not meet the National Board's jurisdictional standards and that application to the National Board would be futile.

In the present case, the Utah Labor Relations Board did not assert jurisdiction until after a charge of unfair labor practices had been filed with the National Board and rejected on jurisdictional grounds.[31] In some cases, however, it has been held that the states may not act unless the National Board has formally rejected jurisdiction over the particular matter, even though it is clear that the employer's operations do not meet the National Board's jurisdictional standards.[32] In other cases, it has been urged that state regulation is not permissible until after exhaustion of all administrative remedies before the National Board, and, accordingly, that a National Board Regional Director's unappealed dismissal of a case, on jurisdictional grounds, is not sufficient to permit the assertion of jurisdiction by the state.[33]

It is respectfully urged that application to, and formal rejection by, the National Board is not a condition precedent to state action if it is clear that the employer's operations do not meet the National Board's standards.

---

[31] *Guss* v. *Utah Labor Relations Board*, 296 P. (2d) 733.

[32] See, *e.g.*, *Benton, Inc.* v. *Printers Local 333*, 291 P. (2d) 13.

[33] See, *e.g.*, dissenting opinion in *Garmon* v. *San Diego Bldg. Trades Council*, 45 Cal. 2d 657, 291 P. (2d) 1, cert. granted, —— U. S. ——, 100 L. ed. (Advance p. 600).

The National Board's practice prior to 1950, of deciding jurisdiction in individual cases, left the status of any single enterprise uncertain until actually adjudicated. In many labor disputes and contract negotiations, management and labor were in no position to know whether they were, or were not, subject to federal law. State labor boards and courts were equally uncertain as to their authority, and their jurisdiction was subject to challenge in practically every case. The necessity of obtaining a formal disclaimer of jurisdiction burdened the National Board with useless work and unnecessary expense, and the delays involved constituted an obstacle to the maintenance of industrial peace. As a result many persons interested in the field of labor relations advocated the establishment of jurisdictional standards by the National Board.[34]

The purpose of the standards promulgated and published by the National Board was to notify the public, *in advance*, of the types of enterprises over which jurisdiction would be asserted and thus permit the Board to devote its entire time, energies and budgetary allotment to matters which substantially affect interstate commerce and are of real federal significance.[35]

A requirement that the National Board must formally decline jurisdiction of each particular labor dispute, as a condition precedent to state action, even when it is clear that the National Board's standards cannot be met, would defeat the purposes of the standards. It would encumber the National Board with unnecessary work and expense,

---

[34] See, *e.g.* Cox and Seidman, *Federalism and Labor Relations*, 64 Harvard Law Review, No. 2 (December, 1950) 211, 217. See also, S. Report 986, Part 3, 80th Cong. 2d Sess., pp. 11-15.

[35] *Breeding Transfer Co.*, 110 N.L.R.B. 493-495, 497.

add to its already large backlog of cases, and seriously delay the processing of local labor disputes by the states—all to establish what was manifest from the outset. The courts never have required parties to undertake obviously futile actions. That principle is applicable here, as this Court recognized in *Bldg. Trades Council* v. *Kinard Construction Co.*, 346 U. S. 933, when it said:

> "Since there has been no clear showing that respondent has applied to the National Labor Relations Board for appropriate relief, *or that it would be futile to do so,* the Court does not pass upon the question suggested by the opinion below of whether the State Court could grant its own relief should the board decline to exercise its jurisdiction." (Italics added.)[36]

It has been said that confusion would result if the states are permitted to regulate labor disputes over which the National Board refuses jurisdiction.[37] The basic premise for this argument is that the National Board's jurisdictional standards are not sufficiently definite to enable the parties or state authorities to determine in advance

---

[36] In its brief *amicus curiae* in *Bethlehem Steel Company* v. *N.Y.S.L.R.B.* (330 U. S. 767) pp. 69-70, the National Board stated: "Since the states may take jurisdiction, however, only if the National Board declines to apply the National Act to the enterprise involved, a showing of such refusal to take jurisdiction by the National Board is a prerequisite to the assertion of jurisdiction by the states. This does not necessarily mean that a petition or charge must be filed with the National Board in each individual case. The National Board may announce a general policy of declining jurisdiction in an entire class of cases. * * * In such cases the National Board's announcement of general policy is itself adequate to justify the initiation of proceedings before the State Board."

[37] See, *e.g.*, *Retail Clerks* v. *Your Food Stores*, 225 F. 2d 659, 663.

whether a particular labor dispute falls within or without the formula. This argument, it is submitted, is without merit.

The National Board's jurisdictional standards, fixed in terms of the dollar volume of income, inflow or outflow of enterprises in various industries, are specific and detailed; certainly so in comparison with the terms "affecting commerce" or "engaged in the production of goods for commerce" which are the customary guideposts provided in federal legislation.[38] In the vast majority of cases, application of the standards presents no problem. It is only in a relatively few borderline cases that any question or uncertainty arises. Such a penumbral area is inevitable under our federal system, and the existence of some doubtful borderline cases manifestly cannot upset an otherwise lawful allocation of jurisdiction between the federal and state governments. It must be assumed that state authorities will recognize and honor the "line of demarcation between exclusive federal and allowable state jurisdiction"[39] and where reasonable doubt exists, will decline jurisdiction "in deference to the tribunal which Congress has selected for determining such issues in the first in-

---

[38] A 1948 report of the Joint Committee on Labor-Management Relations (80th Cong., 2d Session, S. Report No. 986, Part 3, pp. 14-15) suggested the use of dollar volumes or number of employees as appropriate methods of defining the jurisdiction of the National Board. The report further stated that "To attempt by broad general terms to exclude businesses whose operations are local in nature would again serve as no guide to the labor organizations and small employers * * *"

[39] *Amalgamated Clothing Workers* v. *Richman Bros.*, 348 U. S. 511, 518-519.

stance."[40] If the state should assert jurisdiction, its decision will be subject to review by this Court.[41]

The argument is also erroneous in its assumption that the purported confusion it envisages would be the result of permitting state regulation where the National Board refuses jurisdiction. A boundary line between the federal and state domains is a concomitant of our federal form of government.[42] Doubtful borderline cases will arise whether the line is fixed by the Commerce Clause itself, by congressional legislation, or by a federal agency's regulations or jurisdictional standards. Such confusion as may occur results from the fact that there is a line; not from its location or the identity of its source.

The fact is, of course, that the same borderline cases will arise even if the states are not permitted to fill the vacuum created by the withdrawal of federal power over predominantly local matters. In doubtful cases, the parties still would not know whether the labor dispute comes within, or without, the National Board's standards, and hence,

---

[40] *Weber* v. *Anheuser-Busch Inc.*, 348 U. S. 468, 481. It is the consistent practice of the New York Board to refer matters to the National Board when there is any doubt whether the employer's operations meet the National Board's standards (*Rothenberg* v. *N.Y.S.L.R.B.*, Sup. Ct., N. Y. Co. (not officially reported), 21 L.R.R. Man. 2142, aff'd 273 App. Div. (N. Y.) 884; *Matter of Modern Cleaners Co.*, 13 N.Y.S.L.R.B. 342; *Matter of Seymour Products, Inc.*, 12 N.Y.S.L.R.B. 46, 47-48; *Matter of Metro Hoist & Body Co., Inc.*, 14 N.Y.S.L.R.B. 308, 310-311; *Matter of Hoffman Packing Co., Inc.*, 12 N.Y.S.L.R.B. 512, 513; *Matter of Imperial Engraving Co., Inc.*, 12 N.Y.S.L.R.B. 559, 560; *Matter of Grandview Dairy, Inc.*, 11 N.Y.S.L.R.B. 112, 115; *Matter of Buffalo Industrial Bank*, 11 N.Y.S.L.R.B. 205, 206; *Matter of Buffalo General Laundries, Inc.*, 11 N.Y.S.L.R.B. 275, 276-277).

[41] *Amalgamated Clothing Workers* v. *Richman Bros.*, 348 U. S. 511, 520-521.

[42] *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30; *Polish Nat'l. Alliance* v. *N.L.R.B.*, 322 U. S. 643, 649-650.

would not know whether they are subject to federal law or no law.

Moreover, preclusion of state regulation, and the resultant "no-man's land," actually would compound the purported "confusion." It would create the anomalous situation where one group is subject to federal labor law, a second group (intrastate) is subject to state labor law, and a third intermediate group is subject to no law whatsoever. The "no-man's land" manifestly would have two boundary lines, namely, (1) the "discretionary" line, created by the National Board's jurisdictional standards, which separates those matters over which the National Board will assert jurisdiction from those in which jurisdiction is declined, and (2) the "constitutional" line, which separates *intra*state matters from those over which the National Board could, but declines to, assert jurisdiction. As previously mentioned, in doubtful cases on the "discretionary" borderline, the parties would not know whether they are subject to federal law or no law. In doubtful cases on the "constitutional" borderline, the parties would not know if they are subject to state law or no law. Certainly, a single boundary line has less potential of confusion than dual boundaries on either side of a "no-man's land." Particularly is that so when the line drawn by the National Board's standards *is* detailed and specific, whereas the second boundary would require the application of abstract concepts such as "interstate" *vis a vis* "intrastate" or "a substantial direct and immediate effect upon interstate commerce" *vis a vis* "an indirect, remote and insubstantial effect upon commerce."

The question for decision, therefore, does not present a choice between confusion and certainty; the choice is between state regulation or anarchy in a substantial segment of labor relations.

Conclusion

It is respectfully submitted that state regulation of labor disputes affecting interstate commerce is permissible where the National Board has refused jurisdiction; and that application to, and formal rejection by, the National Board of jurisdiction over the specific labor dispute is not necessary where it is clear that the employer's operations do not meet the National Board's jurisdictional standards.

Respectfully submitted,

PHILIP FELDBLUM
General Counsel
New York State Labor Relations Board

APPENDIX A

Distribution of Business Firms in the United States According to Number of Employees.[1]

State	*Total Units Reporting*	*Per Cent[2] Employing Under 20*	*Per Cent[2] Employing 20 or More*
Alabama	37,396	90.0	10.0
Arizona	15,798	91.8	8.2
Arkansas	25,552	92.6	7.4
California	243,411	90.7	9.3
Colorado	30,335	92.0	8.0
Connecticut	44,638	90.4	9.6
Delaware	7,172	89.6	10.4
District of Columbia	17,719	89.2	10.8
Florida	70,260	91.4	8.6
Georgia	50,290	89.4	10.6
Idaho	11,813	92.9	7.1
Illinois	185,505	90.3	9.7
Indiana	73,533	90.8	9.2
Iowa	54,886	94.0	6.0
Kansas	41,386	93.2	6.8
Kentucky	39,024	91.2	8.8
Louisiana	40,218	89.5	10.5
Maine	18,769	92.7	7.3
Maryland	39,515	89.2	10.8
Massachusetts	93,907	89.1	10.9
Michigan	116,045	90.7	9.3
Minnesota	57,681	92.0	8.0
Mississippi	24,082	91.4	8.6

[1] *Source*: County Business Patterns, Part I, First Quarter, 1953, published by U. S. Departments of Commerce and Health, Education and Welfare, pp. 8-52, Tables 1B.

[2] All percentages are rounded off to the nearest tenth.

State	Total Units Reporting	Per Cent [1] Employing Under 20	Per Cent Employing 20 or More
Missouri	79,383	90.7	9.3
Montana	13,719	94.0	6.0
Nebraska	28,152	93.5	6.5
Nevada	4,787	91.8	8.2
New Hampshire	11,904	91.5	8.5
New Jersey	105,495	90.3	9.7
New Mexico	12,553	92.0	8.0
New York	370,421	90.2	9.8
North Carolina	56,520	89.3	10.7
North Dakota	10,812	94.4	5.6
Ohio	149,501	89.7	10.3
Oklahoma	40,925	92.2	7.8
Oregon	36,283	91.6	8.4
Pennsylvania	182,631	89.1	10.9
Rhode Island	16,226	88.8	11.2
South Carolina	27,857	90.8	9.2
South Dakota	12,684	95.0	5.0
Tennessee	46,810	91.6	9.4
Texas	157,147	91.1	8.9
Utah	12,505	90.9	9.1
Vermont	7,664	91.8	8.2
Virginia	52,275	90.4	9.6
Washington	49,175	91.6	8.4
West Virginia	28,606	91.5	8.5
Wisconsin	69,439	92.0	8.0
Wyoming	6,975	93.2	6.8
Total United States	2,929,184	90.7	9.3

[1] All percentages are rounded off to the nearest tenth.